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No. 05-184

IN THE
SUPREME COURT OF THE UNITED STATES

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Brief of Amici Curiae International Law Professors Listed Herein in Support of Petitioner (Commissions -- Geographic Requirement)

Jordan J. Paust
University of Houston
Law Center
100 Law Center
Houston, TX 77204
(713) 743-2177

Linda A. Malone
Counsel of Record
College of William and Mary
613 S. Henry Street,
Suite NW 240
Williamsburg, VA 23185
(757) 221-3844

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Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. paras. 81-82 10

The Prosecutor v. Delalic, IT-96-21-A, Judgment (ICTY 20 Feb. 2001) 5, 13

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24 Op. Att'y Gen. 570 (1903) 7

TREATY-RELATED DOCUMENTS, DECISIONS,AND REPORTS

Military Order of Nov. 13, 2001, § 4(A), 66 Fed. Reg. 57,833 (Nov. 16, 2001) 8, 12

Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), U.N. Doc. S/25704 (May 3, 1993) 10

U.N.S.C. Res. 1438, U.N. SCOR, 58th Sess., 4761th mtg.pmbl., U.N. Doc. S/RES/1483 (2003) 6

U.S. Dep't Defense, Military Commission Order No. 1, Mar. 21, 2002 ..... 15, 17

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IV *Commentary, Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, Jean S. Pictet ed. 1958) 5, 6, 9, 12

III *Commentary, Geneva Convention Relative to the Treatment of Prisoners of War* 51 (ICRC, Jean S. Pictet ed. 1960) 5, 9

Norman Abrams, *Anti-Terrorism and Criminal Enforcement* (2003) 14

Annotated Supplement to Commander's Handbook on the Law of Naval Operations (U.S. Naval War College, vol. 73, 1999) 10

Michal R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 Cal. W. L. Rev. 433 (2002) 14

A. Christopher Bryant & Carl Tobias, *Quirin Revisited*, 2003 Wis. L. Rev. 309 (2003) 14

Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. Rev. 1 (2002) 14

2 Henry W. Halleck, *International Law* 444 (1st ed. 1816) 8

Major General Henry W. Halleck, *Military Tribunals and Their Jurisdiction*, 5 Am. J. Int'l L. 958 (1911), *reprinted in* Mil. L. Rev. Bicentennial Issue 15 (1975) 7

Alexander Hamilton, *The Federalist No. 78* (1788) 15

Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law vol. I: Rules* 299 (ICRC 2005) 13

Derek Jinks, *Protective Parity and the Law of War*, 79 Notre Dame L. Rev. 1493 (2004) 12

Harold Hongju Koh, *The Case Against Military Commissions*, 96 AmJ. Int'l L. 337 (2002) 14

Justice Sandra Day O'Connor, *Vindicating the Rule of Law: The Role of the Judiciary*, 2 Chinese J. Int'l L. 1 (2003) 15

Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 Mich. J. Int'l L. 1 (2001) 3, 4, 12, 17

Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 Mich. J. Int'l L. 677 (2002) 14, 16

Jordan J. Paust, *International Law as Law of the United States* (2d ed. 2003) 8, 10, 11, 12

Jordan J. Paust, *International Law Before the Supreme Court: A Mixed Record of Recognition*, 45 Santa Clara L. Rev. 829 (2005) 9, 10

Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 Harv. Int'l L. J. 503 (2003) 9, 10, 12, 16, 17

Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 Columbia J. Transnat'l L. 811 (2005) ..... *passim*

Jordan J. Paust, *The U.S. as Occupying Power Over Portions of Iraq and Special Responsibilities Under the Laws of War* (May 2003), available at http://www.nimj.org/documents/occupation(1).doc 6

Jordan J. Paust, *War and Enemy Status After 9/11: Attackson the Laws of War*, 28 Yale J. Int'l L. 325 (2003) 5

Jordan J. Paust, M. Cherif Bassiouni, et al., *International Criminal Law* (2d ed. 2000) 7, 10, 12, 14

James E. Pfander, *Federal Courts: Jurisdiction Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 Tex. L. Rev. 1433 (2000) 17

Adam Roberts & Richard Guelff, *Documents on the Laws of War* (3 ed. 2000) 10

Marco Sassoli, *"Unlawful Combatants": The Law and Whether It Needs to Be Revised*, 97 Proc., Am. Soc'y Int'l L. 196 (2003) 5

William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 Yale J. Int'l L. 319 (2003) 5

U.S. Dep't of Army, Field Manual 27-10, *The Law of Land Warfare* 31 (1956) 5

U.S. Dep't of Army, TJAG School, *Operational Law Handbook* (2003) 12, 16

U.S. Dep't of Army, Pam. 27-161-2, II International Law 132 (1962) 6

William Winthrop, *Military Law and Precedents* 836 (2d ed. 1920) 2, 14

Detlev F. Vagts, *Which Courts Should Try Persons Accused of Terrorism?*, 14 Eur. J. Int'l L. 313 (2003) 14

UK, *The Manual of the Law of Armed Conflict* (2004) 5, 6, 10

INTEREST OF AMICI CURIAE

Amici Curiae, the international law professors named below, include the Amici in *Hamdan* before the District of Colombia Circuit Court and the district courts below, or other professors who have lectured and/or published widely on these and related matters.[1] This amicus memorandum sets forth their considered views. We generally support the recognitions in the District Court below and generally oppose most of the conclusions of the Court of Appeals below. However, we focus here on three main points, as explained in the Summary of Argument. Amici sign this memorandum on their own behalf and not as representatives of their respective schools. The affiliations of amici are listed in the appendix.

SUMMARY OF ARGUMENT

There are three reasons why the military commissions are unlawfully constituted and without jurisdiction even if a detainee-accused is not a prisoner of war. First, military commissions are "war courts" and their jurisdiction is limited in terms of context and time to a circumstance of actual war, and in terms of place to an actual theater of war or a war-related occupied territory. Guantanamo, Cuba is neither in a theater of war nor a war-related occupied territory and, thus, a military commission situated there does not have lawful jurisdiction. Second, Department of Defense (DOD) rules of procedure and instructions for military commissions do not comply with jurisdictionally-related requirements of customary and treaty-based international law (which is the

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[1]Letters of consent to the filing of this brief accompany this brief. No counsel for a party authored this brief in whole or in part and no person, other than Amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

constitutionally-based supreme law of the United States binding on the President and federal courts) that trial must be in a regularly constituted, independent, impartial tribunal and that there must be review by a competent, independent, and impartial court of law.

Third, a serious violation of the separation of powers exists because the military commissions at Guantanamo do not comply with Article I, Section 8, clause 9 of the U.S. Constitution, which requires that tribunals be constituted as "inferior to the Supreme Court" and thus, subject to its ultimate control. Thus, the commissions are not lawfully constituted and lack jurisdiction.

ARGUMENT

I. Limits on Presidential Power to Create a Military Commission and Lack of Jurisdictional Competence

A. Limitations With Respect to Place

The President's power as Commander-in-Chief to set up a military commission and its jurisdictional competence apply only during an actual war (to which the laws of war apply), and within a war zone (i.e., an actual theater of war) or a war-related occupied territory. *See, e.g., The Grapeshot*, 76 U.S. 129, 132-33 (1869) (jurisdiction exists "wherever the insurgent power was overthrown"); William Winthrop, *Military Law and Precedents 836* (2d. 1920); Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 Mich. J. Int'l L. 1, 5 & n.14, 25 n.70, 26-27 (2001) [hereinafter Paust, *Military Commissions*]; *see also Madsen v. Kinsella*, 343 U.S. 341, 346-48 (1952) (military commissions are "war courts," "related to war," and are proper in a war-related occupied enemy territory "in time of war"); *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946) (jurisdiction exists in "occupied enemy territory"); *id.* at 326

(Murphy, J., concurring) (jurisdiction exists "[o]nly when a foreign invasion or civil war actually closes the courts"); *In re Yamashita*, 327 U.S. 1, 11, 20 n.7 (1946) (a military commission is a "war court" prosecuting the "law of war" and in that instance was created by a military commander in charge of the U.S. Army Forces, Western Pacific, theater of war and war-related occupied territory "so long as a state of war exists." Id. at 9-12); *Coleman v. Tennessee*, 97 U.S. 509, 515 (1878) ("when ... in the enemy's country"); *id.* at 517 (when occupation of enemy territory occurs). As Colonel Winthrop recognized in his classic study of military law: "A military commission ... can legally assume jurisdiction only of offences committed within the field of command of the convening commander," and regarding military occupation, "cannot take cognizance of an offence committed without such territory.... The place must be the theater of war or a place where military government or martial law may be legally exercised; otherwise a military commission ... will have no jurisdiction...." Winthrop, *supra*, at 836. Contrary to the opinion of the Court of Appeals in this case, the military commission set up within the United States during World War II and recognized in *Ex parte Quirin* had been created during war in what was then an actual theater of war for prosecution of enemy belligerents for violations of the laws of war that occurred within the United States (in Florida and New York) and within the convening authority's field of military command – the Eastern Defense Command of the United States Army. 317 U.S. 1, 22 n.1 (1942).

What is unavoidably problematic with respect to military commission jurisdiction at Guantanamo, Cuba is the fact that the U.S. military base at Guantanamo is neither in an actual theater of war nor in a war-related occupied territory. *See, e.g.*, Paust, *Military Commissions*, *supra*, at 25 n.70. *See also Rasul v. Bush*, 124 S.Ct. 2686 (2004) (Kennedy, J., concurring) (correctly describing Guantanamo as territory "far removed from any hostilities" and clearly not in an

actual theater of war). Consequently, a military commission at Guantanamo is not properly constituted and is without lawful jurisdiction. Also, alleged violations of the laws of war by detainees during a war with the Taliban in Afghanistan did not occur in Cuba or within the field of command of the convening commander.

Further, the District Court properly recognized other jurisdictional limits: (1) "[t]he President may establish military commissions only for offenders or offenses triable by military tribunal under the laws of war," (2) "limits [are] now set for military commissions" by Congress "by Article 21" of the U.C.M.J. (by 10 U.S.C. § 818, 821), and (3) approval "does not extend past 'offenders or offenses that by statute or by the law of war may be tried by military commissions.'" *Hamdan v. Rumsfeld*, 344 F.Supp.2d 152, 158-59 (D.D.C. 2004).

Another jurisdictional problem with respect to prosecution of certain persons in a military commission at Guantanamo involves an absolute prohibition under the laws of war. Any person who is not a prisoner of war and who is captured in occupied territory in Afghanistan cannot be transferred out of occupied territory. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 49, 75 U.N.T.S. 287, 6 U.S.T. 2516 [hereinafter GC or Geneva Civilian Convention][2] expressly mandates that "[i]ndividual or mass

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[2]The Geneva Conventions apply to the wars in Afghanistan and Iraq even though the U.S. cannot be at "war" with al Qaeda as such. Importantly, the District Court below was correct that a member of al Qaeda, like *any* person in the war area, is covered under certain provisions of the Civilian Convention if captured during war in Afghanistan or Iraq. *See, e.g., Hamdan*, 344 F. Supp.2d at 160-64; Paust, *Military Commissions*, *supra*, at 5-8 n.16; Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 Columbia J. Transnat'l L. 811, 816-20, 829-30 (2005)

forcible transfers ... of protected persons from occupied territory ... are prohibited, regardless of their motive." GC, art. 49.[3] Further, "unlawful deportation or transfer" is not

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[hereinafter Paust, *Detainees*]; Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 Yale J. Int'l L. 325, 325-28 (2003).

[3]*See* GC. art. 76 ("persons accused of offences shall be detained in the occupied country"); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 85(4)(a) [hereinafter Geneva Protocol I]; IV *Commentary, Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 278-80, 363 (ICRC, Jean S. Pictet ed. 1958) [hereinafter IV Commentary]; UK, *The Military Manual of the Law of Armed Conflict* 293 (2004) ("forbidden to transfer ... not moved outside occupied territory"); Paust, *Detainees*, *supra*, at 850-51; Paust, *Military Commissions*, *supra*, at 24 n.68. Additionally, rights and duties under the Geneva Conventions must be applied "in all circumstances." *See, e.g.*, GC, arts. 1, 3, 27; Paust, *Detainees*, *supra*, at 814-16. Importantly, any detainee who is not a prisoner of war has certain protections under the Geneva Civilian Convention and common Article 3, which now applies in an international armed conflict (*i.e.*, there are no gaps in Geneva law that leave a person without any protections). *See, e.g.*, GC, arts. 3, 5, 13, 16, 27-33; U.S. Dep't of Army Field Manual 27-10, *The Law of Land Warfare* 31, ¶ 73, 98, 247(b) (1956); IV *Commentary*, *supra*, at 14, 51, 58, 595; III *Commentary, Geneva Convention Relative to the Treatment of Prisoners of War* 51 n.1, 76, 423 (ICRC, Jean S. Pictet ed. 1960); UK, *The Manual of the Law of Armed Conflict*, *supra*, at 145, 148, 150, 216, 225; Derek Jinks, *Protective Parity and the Law of War*, 79 Notre Dame L. Rev. 1493, 1504, 1510-11 (2004); Paust, *Detainees*, *supra*, at 817-18, and references cited; Paust, *Military Commissions*, *supra*, at 6-8 n.15; Marco Sassoli, *"Unlawful Combatants": The Law and Whether It Needs to Be Revised*, 97 Proc., Am. Soc'y Int'l L. 196, 197 (2003); William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 Yale J. Int'l L. 319, 321-22 (2003) (William H. Taft, IV is a former legal adviser for the United States Department of State); The Prosecutor v. Delalic, Case No. IT-96-21-T (Trial Chamber, ICTY, Nov. 16, 1998), at para. 271 ("there is no gap between the Third and the Fourth Geneva Conventions"); *Hamdan*, 344 F.Supp.2d at 161, 163. Even nationals of a neutral state are protected while they are outside "the territory of" the detaining state (*e.g.*,

merely a war crime; it is also a "grave breach" of the Convention. GC, art. 147; IV *Commentary*, *supra* note 2, at 280, 599. *See also* Geneva Protocol I, *supra* note 2, art. 85(4)(a). Persons who are not prisoners of war and who were captured in occupied territory and eventually found at Guantanamo must be prosecuted in the territory where they were captured. Trial at Guantanamo would continue the crime.

B. Limitations With Respect to Time

The President's power and a military commission's jurisdiction are limited in terms of time to a circumstance of actual war until the point when peace is finalized. *See, e.g.*, *Madsen v. Kinsella*, 343 U.S. 341, 346-48 (1952) (recognizing that military commission power is "related to war" and acknowledging them as "war courts"); *In re Yamashita*, 327 U.S. 1, 11-13 (1946) (adding id. at 20 n.7: a military commission is a "war court"); *Ex parte Quirin*, 317 U.S. 1, 28 (1942); *The Grapeshot*, 76 U.S. (9 Wall.) 129, 132-33 (1869); *Cross v. Harrison*, 57 U.S. 164, 190 (1853) (permitting jurisdiction until a "treaty of peace"); 24 Op.

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while outside the U.S.) and they are, therefore, not within any exclusion in GC Article 4. *See, e.g.*, GC, art. 4 (neutral nationals are only excluded from Part III when "in the territory of" the detaining state); IV *Commentary*, *supra*, at 48; UK, *The Manual of the Law of Armed Conflict*, *supra*, at 274; U.S. Dep't of Army, Pam. 27-161-2, II *International Law* 132 (1962); Paust, *Detainees*, *supra*, at 819 & n.28, 850-51 (also demonstrating that there is no distinction between persons lawfully or unlawfully within territory).

That the U.S. has been an occupying power in Afghanistan and Iraq is well-known. *See, e.g.*, U.N. S.C. Res. 1438, U.N. SCOR, 58th Sess., 4761st mtg. pmbl., U.N. Doc. S/RES/1483 (2003) (addressing U.K. and U.S. recognitions); Jordan J. Paust, *The U.S. as Occupying Power Over Portions of Iraq and Special Responsibilities Under the Laws of War* (May 2003), *available at* http://www.nimj.org/documents/occupation(1).doc; Paust, *Military Commissions*, *supra*, at 24 n.67.

Att'y Gen. 570, 571 (1903); 11 Op. Att'y Gen. 297, 298 (1865); Paust *et al.*, *International Criminal Law* 309-10 (2d ed. 2000); Winthrop, supra, at 831 (jurisdiction is tied to the war powers, "exclusively war-court"), 837 ("An offence ... must have been committed within the period of the war or of the exercise of military government.... [J]urisdiction ... cannot be maintained after the date of a peace...."). As Major General Henry Halleck wrote, military commissions "have jurisdiction of cases arising under the laws of war," adding: "[they] are war courts and can exist only in time of war." Halleck, *Military Tribunals and Their Jurisdiction*, 5 Am. J. Int'l L. 958, 965-66 (1911). Similarly, in 1865 Attorney General Speed formally advised the President:

> A military tribunal exists under and according to the Constitution in time of war. Congress may prescribe how all such tribunals are to be constituted, what shall be their jurisdiction, and mode of procedure. Should Congress fail to create such tribunals, then, under the Constitution, they must be constituted according to the laws and usages of civilized warfare. They may take cognizance of such offences as the laws of war permit.... In time of peace neither Congress nor the military can create any military tribunals, except such as are made in pursuance of that clause of the Constitution which gives to Congress the power "to make rules for the government of the land and naval forces."

11 Op. Att'y Gen. 297, 298 (1865).

Thus, relevant presidential power is tied to a war circumstance and law of war competencies such as the ability of a war-related occupying power to set up a military commission in war-related occupied territory to try violations of the laws of war in accordance with the laws of war. Congress can regulate the jurisdiction and procedure of military commissions, but must do so consistently with

international law. Specifically, the requirements of international law "are of binding force upon the departments and citizens of the Government, though not defined by any law of Congress" and neither Congress nor the Executive can "abrogate them or authorize their infraction." See, e.g., 11 Op. Att'y Gen. at 298-300; *Madsen v. Kinsella*, 343 U.S. 341, 348-49 (1952); *see also Dooley v. United States*, 182 U.S. 222, 231 (1901) (describing executive military powers as "'regulated and limited ... directly from the laws of war'"), quoting 2 Henry W. Halleck, *International Law* 444 (1st ed. 1861); Jordan J. Paust, *International Law as Law of the United States* 106-07, 169-73 (2d ed. 2003), and cases cited [hereinafter Paust, *Treatise*]; Paust, *Detainees, supra*, at 856-61. Additionally, federal statutes must be interpreted and applied consistently with international law. *See, e.g., United States v. Flores*, 289 U.S. 137, 159 (1933); *Cook v. United States*, 288 U.S. 102, 120 (1933); *The Charming Betsy*, 6 U.S. (6 Cranch) 64, 117-18 (1804); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801); 11 Op. Att'y Gen. at 299-300 (1865); 9 Op. Att'y Gen. 356, 362-63 (1859) ("law ... must be made and executed according to the law of nations"); Paust, *Treatise*, *supra*, at 99, 120, 124-25 nn.2-3.

II. The Geneva Convention Provisions, Including Those Requiring a Regularly Constituted Court, Are Partly Self-Executing and Have Jurisdictional Requirements

We disagree with the Circuit panel and agree with the District Court that all persons detained in a theater of war (regardless of their status) have rights under Geneva law and that most provisions of the Geneva Conventions are self-executing and are judicially enforceable. *See Hamdan*, 344 F.Supp.2d at 164-65; *supra* notes 1-2. The Supreme Court's longstanding test for enforceability is met. *See, e.g., Baldwin v. Franks*, 120 U.S. 678, 683 (1887) (Field, J., dissenting) ("when it declares the rights and privileges which the citizens

or subjects of each nation may enjoy"); *Edye v. Robertson*, 112 U.S. 580, 598-99 (1884) ("enforcement ... in the courts of the country.... whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined"); *Owings v. Norwood's Lessee*, 9 U.S. (5 Cranch) 344, 348-49 (1809) ("Whenever a right grows out of, or is protected by, a treaty ... whoever may have this right, it is to be protected"). Most of the articles of the Conventions contain mandatory language, address express and implied individual rights, and are self-executing under the language of the treaty considered in context test (a test that focuses on express and implied rights, e.g., "grows out of"). *See, e.g.*, GC, arts. 3, 5, 7-8, 27, 38, 43, 48, 72-73, 75-76, 78, 80, 101, 147; *In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443, 478-79 (D.D.C. 2005); *Hamdan*, 344 F.Supp.2d at 164-65; IV *Commentary*, *supra* note 2, at 9, 13, 52, 56-58, 64, 70-72, 74-80, 214-15; III *Commentary, supra* note 2, at 23, 85, 87, 90-91, 415, 472, 484-87, 492-93, 625, 628; Jordan J. Paust, *Judicial Power To Determine the Status and Rights of Persons Detained Without Trial*, 44 Harv. Int'l L.J. 503, 515-17 (2003), and references cited [hereinafter Paust, *Judicial Power*]; Paust, *International Law Before the Supreme Court: A Mixed Record of Recognition*, 45 Santa Clara L. Rev. 829, 836 n.48 (2005) [hereinafter Paust, *Before the S.Ct.*]. Additionally, they are "executed" by congressional legislation in, for example, 10 U.S.C. §§ 818, 821 and 28 U.S.C. § 2241. *See* Hamdan, 344 F.Supp.2d at 164 ("is implemented ... by ... 10 U.S.C. § 821"); Paust, *Judicial Power*, *supra*, at 517 (discussing the habeas statute). Moreover, the President has an unavoidable constitutional duty to faithfully execute the laws of the United States, U.S. treaties are such laws, and the President must execute, and is bound by, treaty law. *See, e.g.*, U.S. Const., art. II, § 3; *Francis v. Francis*, 203 U.S. 233, 240, 242 (1906); *The Lessee of Pollard's Heirs v. Kibbee*, 39 U.S. (14 Pet.) 353, 415 (1840); 11 Op. Att'y Gen. 297, 299-300 (1865); 1 Op.

Att'y Gen. 566, 569-71 (1822); Paust, *Treatise, supra*, at 7-11, 169-73, 488-89, 493-94, and cases cited. The District Court was correct that even a non-self-executing treaty can be used defensively (e.g., not to create a private cause of action). *Compare Hamdan*, 344 F.Supp.2d at 164 *with* Paust, *Judicial Power*, *supra*, at 515 & n.42. Finally, the Geneva Conventions are customary international law of universal application and protect all persons covered during an armed conflict.[4] As such, they are binding on the Executive and rights thereunder are directly incorporable and judicially enforceable. *See, e.g.*, Paust, *Treatise, supra*, at 7-12, 169-73, 175, 488-89, 493-94, and cases cited; Paust, *Detainees, supra*, at 856-61; Paust, *Before the S.Ct.*, *supra* at 839-40 n.53 (unanimous recognition especially that the Executive is bound by the laws of war).

The Court of Appeals recognized that Geneva law creates individual rights, but stated in error that because some

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[4]*See, e.g.*, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704 (May 3, 1993), at para. 35 (the 1949 Geneva Conventions are "part of conventional international humanitarian law which has beyond doubt become part of international customary law"), unanimously approved by U.N. S.C. Res. 827 (1993); Jordan J. Paust, M. Cherif Bassiouni, et al., *International Criminal Law* 658, 807 (2 ed. 2000); UK, *The Manual of the Law of Armed Conflict*, *supra* note 2, at 14 ("In practice, the Geneva Conventions are of virtually universal application and are generally considered to embody customary international law."); *Annotated Supplement to Commander's Handbook on the Law of Naval Operations* 490 n.47 (U.S. Naval War College, Int'l Studies vol. 73, A.R. Thomas and James C. Duncan eds. 1999) ("GPW is the universally accepted standard for treatment of Pws; virtually all nations are party to it and it is now regarded as reflecting customary law."); Adam Roberts & Richard Guelff, *Documents on the Laws of War* 8, 196 (3 ed. 2000); Paust, *Detainees*, *supra*, at 813; see also Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. paras. 81-82, reprinted in 35 I.L.M. 809, 828 (1996).

remedies exist through international processes individuals have no domestic remedies. For centuries, private remedies have been available in courts for violations of the laws of war. *See, e.g., Ex parte Quirin*, 317 U.S. at 27 ("From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes ... the status, right and duties of enemy ... individuals"); Paust, *Treatise*, *supra*, at 64 n.130, 226-27, 291-92 nn.489-95; Winthrop, *supra*, at 780 n.1; Paust, *Detainees*, *supra*, at 852 n.154; *see also Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (Breyer, J., concurring) (war crimes are judicially actionable); *The Paquete Habana*, 175 U.S. 677, 698 ("law of war"), 714 (1900); *Freeland v. Williams*, 131 U.S. 405, 416-17 (1889) ("no civil liability attached" when no war crime); *Ford v. Surget*, 97 U.S. 595, 605-06 (1878) (individuals "relieved from civil liability" where no war crime occurred); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 137 (1851) (suit could be brought in "any district in which the defendant might be found"); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 279 (1796) (Iredell, J.) ("rights ... derived from the laws of war ... and in that case the individual might have been entitled to compensation"); *Hilao v. Estate of Marcos*, 103 F.3d 767, 777 (9th Cir. 1996); *Kadic v. Karadzic*, 70 F.3d 232, 242-43 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996); *Linder v. Portocarrero*, 963 F.3d 332, 336-37 (11th Cir. 1992); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F.Supp.2d 289, 310-11 (S.D.N.Y. 2003). There is nothing in the text or drafting history of the 1949 Geneva Conventions requiring that individuals must lose such remedies. Diplomatic remedies are mentioned merely by way of example. Moreover, as customary laws of war, rights reflected in Geneva law are remediable like other violations of the laws of war and customary law has long been a background for interpretation of the treaties (see, e.g., Paust, *Treatise*, *supra*, at 12, 61, 73,

211, 316, 388, 409, 437). *Johnson v. Eisentrager*, 339 U.S. 763 (1950), addressed the 1929 GPW and occurred prior to changes in the 1949 GPW and treaty-based and customary human rights law requiring access to courts, the right of review, and rights to a remedy – law that is infused into common Article 3 of the 1949 Conventions. *See, e.g.*, Paust, *Military Commissions*, *supra*, at 6 n.15, 25-26; Paust, *Detainees, supra*, at 816; Paust, *Judicial Power*, *supra*, at 507-10, 511 n.27, 514.

We also agree with the District Court that today common Article 3 of the Geneva Conventions sets forth a minimum set of fundamental rights and duties in an international armed conflict and that these include the jurisdictional requirement of trial before a "regularly constituted court affording all the judicial guarantees which are recognized" today as customary human rights to due process incorporated through Article 3. *See Hamdan*, 344 F.Supp.2d at 162-63, 165; Paust, *Judicial Power*, *supra*, at 511 n.27, 514 & n.32; Paust, *Detainees*, *supra*, at 816-17 n.19; IV *Commentary*, *supra* note 2, at 14 ("This minimum requirement in the case of a non-international armed conflict is a fortiori applicable in international conflicts."), 58; Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law* vol. I: Rules 299, 306-19 (ICRC 2005); Paust *et al.*, *International Criminal Law, supra*, at 693, 695, 813-14, 816; U.S. Dep't Army, TJAG School, *Operational Law Handbook* 8-9 (2003); Jinks, *supra* note 2, at 1508-11; Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), 1986 I.C.J. paras. 218 ("There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which ... reflect... 'elementary considerations of humanity'"), 255 (is included in "general principles of humanitarian law ... in the context of armed conflicts,

whether international in character or not"); The Prosecutor v. Delalic, IT-96-21-A, Judgment (Appeals Chamber, International Criminal Tribunal for Former Yugoslavia (ICTY), 20 Feb. 2001), at paras. 143, 150, reprinted in 40 I.L.M. 630 (2001); The Prosecutor v. Tadic, IT-94-1-AR72 (Appeals Chamber, ICTY, Oct. 2, 1995), para. 102 ("The International Court of Justice has confirmed that these rules reflect 'elementary considerations of humanity' applicable under customary international law to any armed conflict, whether it is of an internal or international character. (Nicaragua Case [1986 I.C.J.], at para. 218). Therefore, at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant."), reprinted in 35 I.L.M. 32 (1996); The Prosecutor v. Tadic, Decision on the Defense Motion on Jurisdiction (Trial Chamber, ICTY, 10 Aug. 1995), paras. 65, 67, 74; Abella v. Argentina, Case 11,137, Inter-Am. C.H.R., paras. 155-56, OEA/ser.L/V.97, doc. 38 (1997). Moreover, the same rights and duties are mirrored in Article 75 of Geneva Protocol I, a treaty provision that is also customary international law universally applicable during any international armed conflict. *See, e.g.*, Taft, *supra* note 2, at 321-22; Paust, *Detainees*, *supra*, at 817 n.19, 818 & n.27.

The statement of the Court of Appeals that members of al Qaeda could not be protected by Geneva law because al Qaeda is not a party to the 1949 Geneva Conventions is in fundamental error. *Cf.* Williams, J., concurring. Whenever the Conventions apply to certain armed conflicts (such as those in Afghanistan and Iraq) all persons in the area are protected under various articles in the Conventions whether or not they are members of some group that cannot ratify treaties or be at war. *See, e.g.*, Paust, *Detainees*, supra, at 816-21, 829-30; Taft, *supra* note 2, at 321-22. Further, members of al Qaeda are most likely nationals of various parties to the Conventions and are thus protected. Additionally, the Conventions reflect customary international

law that is universally applicable and protects all human beings found in a theater of war or occupied territory according to the terms of various articles. If the Court of Appeals had been correct that laws of war do not apply to al Qaeda, they could not be prosecuted for war crimes and even U.S. military commissions in Afghanistan or Iraq are necessarily without jurisdiction. This is, however, fundamental error. Kadic recognized the application and judicial enforcement of common Article 3 even though Bosnian Serbs could not ratify the Geneva Conventions. Karadzic has also been indicted by the ICTY for violations of Geneva law. *See, e.g.*, Paust et al., *International Criminal Law*, at 88-99. Linder is similar with respect to the liability of the Contras. In this sense, rights and duties under Geneva law are concomitant. Also, "private contractors" in Iraq have rights and duties under Geneva law even though their companies cannot ratify treaties.

The President's Military Order and DOD rules for military commissions assure denial of the customary and treaty-based human rights to trial before a regularly constituted, competent, independent, and impartial court;[5] to

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[5]*See, e.g.*, Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 Mich. J. Int'l L. 677, 687-88 (2002) [hereinafter Paust, *DOD Rules*]; A. Christopher Bryant & Carl Tobias, Quirin *Revisited*, 2003 Wis. L. Rev. 309, 360-61 (2003); Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. Rev. 1, 10-12, 58-59 (2002); Harold Hongju Koh, *The Case Against Military Commissions*, 96 Am. J. Int'l L. 337, 338-39 (2002); Detlev F. Vagts, *Which Courts Should Try Persons Accused of Terrorism?*, 14 Eur. J. Int'l L. 313, 322 (2003); *see also* Norman Abrams, *Anti-Terrorism and Criminal Enforcement* 330-31 (2003); Michal R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 Cal. W.L. Rev. 433 (2002); Justice Sandra Day O'Connor, *Vindicating the Rule of Law: The Role of the Judiciary*, 2 Chinese J. Int'l L. 1, 3-4 (2003) (quoting the Declaration of Rights of the

review by a competent, independent, and impartial court of law;[6] and to various other human rights, including freedom from discrimination on the basis of national origin (since only aliens will be subject to prosecution before the military commissions), rights to equality of treatment and equal protection, and "denial of justice" to aliens.[7] Such rights are

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Massachusetts Constitution, art. 29, which "framed by John Adams, boldly declares, 'It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit,'" and adding: "Individual judicial independence is necessary if each case is to be resolved on its own merits, according to the facts and the law.").

[6]*See, e.g.*, Paust, *Military Commissions*, *supra*, at 11 (U.S. Exec. Country Reports addressing this violation of fundamental human rights), 15 & n.34, 22-23; Paust, *DOD Rules*, *supra*, at 678-81, 685-86. The Executive's military "Review Panel" may not overturn a conviction, reverse or amend a decision, or order dismissal or release of the person (or order anything else), because it bound to "either (a) forward the case to the Secretary of Defense with a recommendation as to disposition, or (b) return the case to the Appointing Authority for further proceedings" if a majority of the panel decides that "a material error of law occurred." Military Commission Order No. 1 (Mar. 21, 2002), § 6(H)(4), *available at* http://www.defenselink.mil/news/Mar

2002/d20020321ord.pdf. Further, only one member of the panel must be a lawyer, since only one member must "have experience as a judge," and no member of the panel must have been a judge with expertise in the laws of war, international law more generally, or criminal law more generally. *See id.* § 6(H)(4). The final "decision" in such a "review" and "recommendation" system will be made by the Secretary of Defense or the President. *Id.* § 6(H)(2), (6). *See also Reid v. Covert*, 354 U.S. 1, 36 n.66 (1957) ("Liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments....") (quoting Alexander Hamilton, *The Federalist No. 78* (1788)).

[7]*See, e.g.*, Paust, *Military Commissions*, *supra*, at 10-17; Paust, *DOD Rules*, *supra*, at 678-85 (including impermissible discrimination on the basis of national origin, denial of equal access to courts and to equality of treatment and equal protection of the law, "denials of justice" in violation of customary international law, and denial of the fundamental human

incorporated through common Article 3 of the Geneva Conventions as minimum guarantees for any person detained in any armed conflict, regardless of their status (e.g., as combatants or noncombatants) and whether or not the due process requirements are mirrored elsewhere in the Conventions. *See, e.g.*, GC, art. 3(1)(d); Paust, *Judicial Power*, *supra*, at 511 n.27, 514 & n.32; Paust, *DOD Rules*, supra, at 678 n.9. The same customary human rights are incorporated into the requirements of Article 75(4) of Protocol I.

Additionally, there are related points made about military commission jurisdiction and due process in a 1970 Department of Defense, Office of the General Counsel, and Department of the Army, OTJAG, Military Justice Study on "Military Commissions," cited in 23 Mich. J. Int'l L. 1, 2 n.7 (2001) and reproduced in an appendix in an amici brief below and here from Professor (then U.S. Army Captain, JAGC) Paust's personal copy as an Appendix. In particular, offenses must be committed within the convening authority's field of command (App. 1b, 3b, pt. I(A)); there is a need "to the greatest degree possible" to approximate a civilian court (App. 7b, pt. I(C)); regarding trial procedures, "[b]oth logic and precedent indicate that a lesser standard [than that for courts-martial] for military commissions would not be constitutionally permissible" (App. 12b, pt. V(A)); "the procedures adopted should provide every safeguard which an accused would be entitled to in a court-martial or a Federal district court" (App. 14b, pt. V(A)); and "rules should, as far as practicable, conform with the rules of evidence generally recognized in the trial of criminal cases in Federal district courts" (App. 18b, pt V(E)).

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right to fair, meaningful and effective judicial review of the propriety of detention).

III. A Violation of the Separation of Powers

Third, a serious violation of the separation of powers exists with respect to the attempt by the President in his 2001 Military Order to preclude any judicial review of U.S. military commission decisions concerning offenses against the laws of war and other international crimes over which there is concurrent jurisdictional competence in federal district courts. *See* U.S. Dep't Defense, Military Commission Order No. 1, i, § 7(B)(1)-(2); see also id. §§ 6 H (4)-(6), 7 B. He cannot do so lawfully. *See*, e.g., Paust, *Military Commissions*, *supra*, at 10-11, 15; Paust, *Judicial Power*, *supra*, at 518-24. Additionally, under Article I, Section 8, clause 9 of the United States Constitution, Congress merely has power "[t]o constitute Tribunals inferior to the Supreme Court" and, thus, tribunals subject to ultimate control by the Supreme Court. *See* James E. Pfander, *Federal Courts: Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 Tex. L. Rev. 1433, 1454-56 (2000); *see also* Article I, Section 8, clause 14 of the United States Constitution (which gives Congress the authority to make rules for the government of the land and naval forces). For this reason, the congressional authorization for creation of military commissions in 10 U.S.C. § 821 is necessarily subject to the constitutional restraint contained in Article I, Section 8, clause 9 and the President's attempt to preclude any form of judicial review is constitutionally improper whether or not a military commission has support in a general congressional authorization. The Supreme Court has already recognized the propriety of habeas review concerning detention at Guantanamo. *Rasul v. Bush*, 542 U.S. 466 (2004); *see also* Paust, *Judicial Power*, *supra*, at 517 & n.47, 519-20 n.67.

CONCLUSION

Military commissions are "war courts" and their jurisdiction is limited in terms of context and time to a circumstance of actual war and in terms of place to an actual theater of war or a war-related occupied territory. Guantanamo, Cuba is not in a theater of war or war-related occupied territory and, thus, a military commission situated there does not have lawful jurisdiction. Second, some of the present DOD rules of procedure and instructions for military commissions do not comply with international law, which is constitutionally-based supreme law of the United States binding on the President and the courts. Since their use would be unlawful, trial in the military commissions presently constituted would be without lawful authority. In particular, the President's Military Order unlawfully attempts to preclude the fundamental right to trial in a regularly constituted, competent, independent, and impartial court; and to review by a competent, independent, and impartial court of law. This alone obviates any lawful authority that the military commission process might have.

Third, a serious violation of separation of powers exists because the military commissions at Guantanamo do not comply with Article I, Section 8, clause 9 of the U.S. Constitution, which requires that tribunals be constituted "inferior to the supreme Court" and, thus, subject to its ultimate control. For this reason alone, the military commissions are unlawfully constituted.

In view of these three independent reasons why the military commissions do not have lawful jurisdiction, it is not in the interest of the U.S. to allow individuals to be brought before an illegally constituted and unconstitutional commission and defendant should not have to endure an illegal process in an unlawful commission without jurisdiction.

Amici curiae International Law Professors request that the Supreme Court reverse the decision of the Court of Appeals.

Respectfully submitted on behalf of *amici*,

Linda A. Malone*
Marshall Wythe Foundation Professor of Law and Director of the Human Rights and National Security Law Program
College of William and Mary
613 S. Henry Street, Suite NW 240
Williamsburg, VA 23185
(757) 221-3844

Jordan J. Paust
Mike and Teresa Baker Law Center Professor
University of Houston Law Center
100 Law Center
Houston, TX 77204
(713) 743-2177

**Counsel of Record for Amici Curiae*

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APPENDIX A

LIST OF AMICI

M. Cherif Bassiouni is Distinguished Research Professor of Law and President of the International Human Rights Law Institute at DePaul University College of Law.

Nathaniel Berman is Professor of Law at the Brooklyn Law School.

Richard B. Bilder is Foley & Lardner-Bascom Emeritus Professor of Law at the University of Wisconsin Law School.

Carolyn Patty Blum is Clinical Professor of Law Emeritus at the University of California, Berkeley School of Law.

Benjamin Davis is Associate Professor of Law at the University of Toledo College of Law.

Daniel H. Derby is Professor of Law and Director of International Programs at Touro College Jacob D. Fuchsberg Law Center.

Mark A. Drumbl is Ethan Allen Faculty Fellow and Associate Professor of Law at Washington & Lee University School of Law.

Brian J. Foley is Assistant Professor of Law at Florida Coastal School of Law.

Diane Geraghty is Professor of Law at Loyola University, Chicago, School of Law.

Peter Krug is Professor of Law & Herman G. Kaiser Foundation Chair in International Law at the University of Oklahoma Law Center.

Bert Lockwood is Distinguished Service Professor and Director of the Urban Morgan Institute for Human Rights at the University of Cincinnati School of Law.

Thomas McDonnell is Professor of Law at Pace University School of Law.

Jennifer Moore is Professor of Law at the University of New Mexico School of Law.

Makau Mutua is Professor of Law at the State University of New York at Buffalo School of Law.

Jerry E. Norton is Professor of Law at Loyola University, Chicago, School of Law.

Hari M. Osofsky is Visiting Assistant Professor at the University of Oregon School of Law.

Cesare P.R. Romano is Assistant Director, Project on International Courts and Tribunals at New York University.

Leila Nadya Sadat is Henry H. Oberschelp Professor of Law at Washington University School of Law.

Lowell Schechter is Professor of Law at Northern Kentucky University, Chase College of Law.

Andrea K. Schneider is Professor of Law at Marquette University Law School.

Edward F. Sherman is Moise S. Steeg, Jr. Professor at Tulane University School of Law.

Nadine Strossen is Professor of Law at New York Law School and President of the American Civil Liberties Union.

A. Dan Tarlock is Distinguished Professor of Law at Chicago-Kent College of Law.

Daniel C. Turack is Professor of Law at Capital University Law School.

Connie de la Vega is Professor of Law and Academic Director of International Programs at the University of San Francisco School of Law.

Gabriel Wilner is Professor of International Law at the University of Georgia School of Law.

Edieth Y. Wu is Associate Dean and Professor of Law at Thurgood Marshall School of Law.

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APPENDIX B

MILITARY COMMISSIONS

PREPARED BY D.A. JAGO, MJ AND JAG SCHOOL & GEN. COUNSEL OFFICE (1970)

I. Establishment of a Military Commission

A. Selecting the Convening Authority

Traditionally, military commissions have been established by military commanders to try offenses which were committed both (1) within a theater of war and (2) within the convening authority's field of command. Winthrop 836-37. Thus, for example, the American commander in the Philippines convened the military commission in the Yamashita case in order to try Japanese prisoners of war for offenses committed within his jurisdiction. *In re Yamashita*, 327 U.S. 1, 9-10 (1946). The Court in that case noted that the offenses involved were committed within the Philippines, the convening authority's field of command, and added that military commissions "may be appointed by any field commander, or by any commander competent to appoint a general court martial...." 327 U.S. at 10.

In this case, a military commission could conceivably be convened by an appropriate American commander in Vietnam; in this way, the exact procedure used in Yamashita and described in Winthrop could be followed. The trial would have to be conducted in Vietnam, and the defendants would have to be arrested in the United States and transported abroad. Such an approach is not entirely without precedent; a companion case to Yamashita involved a former Japanese officer who was arrested in Japan and brought to

the Philippines for trial. *Homxna v. Patterson*, 327 U.S. 759 762n. 4 (1946). Trial in Vietnam would also dispense some of the arguments which would be raised under *Ex parte Milligan*, 4 Wall. (71 U.S.) 2 (1866), since no American civilian courts would be open and functioning in the area whore the trial was held. See Winthrop 836.

There are, however, very good policy reasons for conducting this particular trial within the United States. Trial in Vietnam would require the defendants to be arrested and taken into a combat zone, far from home and far from many of the witnesses they would wish to call in defense. It would be an expensive proposition, both for the Government and the defense, and conflicts with concurrent court-martial proceedings in the United States might well develop. Since the trials of the military personnel involved are taking place within the United States, the Army would seem to be imposing an unnecessary and discriminatory hardship on the accused ex-soldiers. The press might argue that trial in an isolated area was an attempt to discourage full reporting of the events at trial. Moreover, given the hostility of the Vietnamese Government to any trials arising out of the Son My Incident, we could expect international complications to arise from any decision to conduct proceedings within Vietnamese territory. It should also be noted that U*nited States ex. Rel. v. Quarles*, 350 U.S. 11 (1955), in which the Supreme Court struck down an attempt to exert military jurisdiction over civilians, involved an overseas trial

Thus, it would seem, preferable to depart from the typical procedure and hold any military commission proceedings in the United States. Such a decision on venue would, however, sharply limit the Army's flexibility in selecting the appropriate convening authority. The language of both Winthrop and of the Supreme Court in *Yamashita* indicates that the convening authority must have held command authority over tine area where the offense was committed. *Ex parte Quirin*, 317 U.S. 1 (1942), which involved a military

offense committed within the United States, is no exception. There the President convened the military commission, 7 Fed. Reg, 5103 (1942), and he, as Commander-in-Chief, certainly had command jurisdiction within the United States. Moreover, the commander who convenes the military commission ought to be one who ordinarily possesses military justice responsibilities; the reference in Yamashita to commanders competent to appoint general courts-martial certainly makes this desirable. Finally, the convening authority ought to have jurisdiction over the place where the trial is held. This requirement is not only traditional in military law; it also follows from the uniform practice in regard to military commissions. Under Article 22 of the U. C.M. J., the only general court martial convening authorities who meet all those tests are the President and the Secretary of the Army.

Historically, there is little precedent for actions by either the President or the Secretary; almost all military commissions have been convened by military commanders in the field. The International Military Tribunal at Nuremberg was, of course, established by executive agreement among the allied powers, but the subsequent trials conducted by the United States alone were authorized by a military ordinance signed by the four allied military commanders in occupied Europe. T. Taylor, *Final Report on the Nuremberg War Crimes Trials* 250 (1949).

Nevertheless, there is clear authority for action by the President. *In Ex parte Quirin*, 317 U. S. 1 (1942), President Roosevelt, utilizing both his statutory power and his constitutional authority as President and Commander-in-Chief, appointed a military commission consisting of seven general officers to try a group of German saboteurs. 7 Fed. Reg. 5103 (1942). A variant of this procedure was used after the civil war to try Henry Wirz, the commandant of the Confederate prison at Andersonville, Georgia. In that case the Assistant Adjutant General convened the commission "by

order of the President of the United States." H. R. Ex. Doc. 23, 40th Cong., 2d Seas. (1866). The *Wirz* procedure was also employed late in World War II when the President, by order of January 11, 1945, authorized certain military commanders to convene military commissions to try German saboteurs. The commanders were to act "under the supervision of the Secretary of War."

Although the Secretary could conceivably act alone, the *Quirin*, *Wirz*, and 1945 saboteurs precedents argue strongly that it should be either the President himself or an official acting under authority of a Presidential delegation who convenes the military commission in this case. In any case, the President would probably have to act to give clear authority for the creation of any special procedural rules which are thought necessary for this military commission. By Article 36 of the Uniform Code of Military Justice, the President is given the power to specify rules of procedure for military commissions. The only currently effective presidential exercise of this power is a brief statement found in paragraph 2 of the *Manual for Courts Martial*. That paragraph states that military commissions are to be "guided" by the law and procedures applied by courts-martial, "subject to any applicable rule of international law or to any regulations prescribed by the President or by any other competent authority. "Since it is not clear who a "competent authority" might be in this case, it would be advisable to have a clear presidential delegation as a basis for any special procedural rules which needed to be promulgated. Action by the President could also allow invocation of any inherent power to appoint military commissions which the Commander-in-Chief might possess, independent of a statute. See *Ex parte Quirin*, 317 U.S. at 29.

For all these reasons, the best procedure would be to convene the military commission either by order of the President or under authority of a presidential delegation, presumably to the Secretary of Defense or the Secretary of

the Army but conceivably to a military commander within the United States. Under Article 140 of the Uniform Code of Military Justice, all of the President's authority is delegable. If the delegation were to an official subordinate to the Secretary of Defense, the actions of the delegated convening authority could, under the precedent of the 1945 saboteur case, be made subject to the "supervision" of any superior official. Accordingly, it would be possible to delegate, by executive order, the President's power to establish a military commission and his power to specify the procedures the commission is to utilize. The President's delegate could then do what President Roosevelt did in *Quirin* -- name the members of the commission, define its jurisdiction, and specify certain essential procedural points. The President's delegate should probably specify that the defendants should be accorded all substantive rights possessed by defendants tried by general court-martial, and that the commission could devise only those necessary additional procedures for which no guiding precedent can be found in court martial practice.

B. Procedure for Convening the Commission

Assuming that the commission is to be convened under the authority of the President, the first step would be the issuance of an Executive Order authorizing the Secretary of the Army (or other delegate) to convene a military commission to try former military personnel for offenses against the law of war; the order could be in general terms, or it could be limited to offenses alleged to have been committed at Son My. The order would cite as authority the President's power as Commander-in-Chief, Articles 18-21, 36, and 140 of the Uniform Code of Military Justice, and perhaps Article 22 which makes the President a general court martial convening authority). It would delegate both the power to convene the com-mission and the power to specify its procedures in accordance with Article 36 of the Code. Redelegation would be permitted, citing Article 140.

An alternative would be to follow the practice used in *Quirin* and to have the Executive Order specify the membership of the commission, the essential procedural points, and the names of the defendants. This procedure has several drawbacks. First, it would unnecessarily involve the White House in many detailed questions about the composition and organization of the tribunal in which the President would undoubtedly have no interest. Second, it would, by specifying the names of the defendants, rule out the conduct of a pretrial investigation analogous to that required for courts-martial by Article 32 of the Code. Third, it would make the President the convening authority and would involve him in a number of trial matters -- such as determining the propriety of confinement and reviewing the record -- which he would undoubtedly prefer to have handled by others. The preferable procedure would be a brief Executive Order delegating authority.

If such a brief order were issued giving the Secretary power to act as the President's delegate, the Secretary should immediately issue an order convening the commission, specifying its jurisdiction and authority, and naming its members. The order would state that the commission would meet at a specified place at such future time as charges should be referred to it. Such action would be necessary to give the commission at least de jure existence prior to charging or apprehending the defendants; it would allow the defendants to sue for a writ of habeas corpus immediately upon being placed under restraint, and it might result in a pretrial judicial determination on the question of jurisdiction. Such an early decision on the jurisdictional question would seem to be in the interest of both the Government and the defendants. The Secretary's order would specify any important procedural questions (such as the way the commission will receive cases and the type of review to be given its decision) and would redelegate to the commission the powers to devise those necessary additional procedures

for which no guiding precedent can be found in court-martial practice.

C. Composition of the Commission

According to Winthrop, there are no limitations at all upon the composition of military commissions; any number of members, military or civilian, may be chosen by the convening authority. Ordinarily, however, commissions -- like courts-martial -- consists of military officers senior in rank to any defendants. Winthrop 835-36. The commission in *Quirin* consisted of seven officers; in *Yamashita*, it consisted of five; in the Civil War trial of Clement Vallandigharn, there were nine officers on the court, and the same number was used in the Wirz trial immediately after the war. The American occupation courts in Germany after World War II, which the Supreme Court treated as military commissions in *Madsen v. Kinsella*, 343 U.S. 341 (1952), consisted of three American civilians, two "judges" and one "magistrate." *Id.* at 344. Winthrop notes that "a commission of a single member would be as strictly legal as would be one of thirteen members. " Winthrop 835.

In this case, two important considerations will affect any decision about the composition of the tribunal. First, the commission should be constituted in a manner which will not give rise to the argument that the defendant has been deprived of any important rights by the use of a military commission rather than a general court martial. Second, the commission ought to be organized in a way which will counteract, to the greatest degree possible, the argument that the defendants have sacrificed crucial rights by being deprived of a trial before a civilian court. The first consideration argues for appointing a court of at least five members, including an analogue of a military judge, and for giving the parties challenges to members of the court to at least the same degree as would be allowed in a trial before a general court martial. The second consideration gives rise to

more difficult problems. Lacking the power to compel jury service, it would be impossible to impanel a randomly selected group of jurors as part of the commission. However, members of the panel ought to be chosen in a way which will not give rise to the argument that it has been "stacked" against the defendants. Although military personnel certainly ought to be included to insure some degree of expertise in military law and in the realities of the battlefield, thought should certainly be given to including on the panel civilian members or activated reservists who are not closely tied in the public eye with the military. Although the "judge" or presiding officer should be experienced in military law, nonmilitary jurists or even laymen might well be included on the panel. Inclusion on the panel of persons not on active military duty will also lessen the impact of any "command influence" arguments which could result from having the commission convened under the authority of the President and the Secretary.

II. Filing of Charges and Specifications

According to Winthrop, the ordinary practice in regard to charges and specifications for offenses triable by military commission is "precisely as in the court martial practice." Winthrop 842. Article 30 of the Uniform Code of Military Justice, which governs charges and specifications, is not limited in effect to court-martial offenses, and may govern military commissions as well. It requires the signing of charges and specifications, under oath, by a person subject to military law, and states that the signer must declare both that he has personal knowledge of, or has investigated, the matters set forth and that the charges are true in fact to the best of his knowledge and belief. Article 30 also incorporates a requirement that the person accused be informed of the charges against him "as soon as practicable." In the *Quirin* case, for example, the charges and specifications were signed

by a colonel the day after the commission was convened, and were attested by The Judge Advocate General.

In order to comply with the traditional practice of military commissions, with Article 30 of the U. C. M. J., and with the notice requirements imposed by the Due Process clause of the Fifth Amendment, charges and specification ought to be drafted, signed, attested, and served shortly after the convening of the commission; the same procedure utilized for courts-martial should be employed. Presumably, the evidence developed by the CID would be referred to a disinterested officer, and the charges and his report and recommendations would be referred to the convening authority for action.

III. Apprehension and Imposition of Restraint,

The sections of the Uniform Code of Military Justice governing "apprehension" and "imposition of restraint, "articles 7 and 9, state specifically that they apply both to persons ordinarily subject to the Code and tothose "subject to trial thereunder. "This latter category appears to apply to persons, not ordinarily subject to military law, who are triable in a military tribunal for violation of the law of war. Hence, the Code seems clearly to authorize apprehension and restraint of persons subject to trail by military commission.

Article 7 governs "apprehension. " It allows a person to be apprehended, or taken into custody, "upon reasonable belief that an offense has been committed and that the person apprehended has committed it." Paragraph 19 of the *Manual for Courts Martial*, which also applies to all persons subject to trial under the Code, authorizes all commissioned, noncommis ioned, and warrant officers to effect such apprehensions.

The provisions governing the imposition of restraint are slightly more complicated. Under the Code, arrest is defined as moral restraint imposed by oral or written orders; confinement is physical restraint. Article 9 specifically grants authority for either the arrest of the confinement of civilians subject to trial under the Code. It states, however, that a civilian subject to trial under the Code may be ordered into arrest or confinement only upon order of "a commanding officer to whose authority is subject." Although it is not altogether clear who the "commanding officer" would be in the case of civilians not serving with a military organization, it would probably be safe to assume that, in this context, the proper person would be the authority convening the military commission. Article 9(c), the relevant subsection, also declares that the authority to order civilians into arrest or confinement may not be delegated. Hence, the convening authority would have to sign any arrest or confinement orders personally.

Article 10, which discusses the type of restraint which is appropriate in certain cases, for some reason is limited in effect to those persons "who are charged with an offense under the Code. Hence, it would be inapplicable to this situation. However, Article 9 does provide adequate authority for the arrest or confinement of all persons, subject to trial by a military court, and such power has traditionally been exercised in commission cases. Although there is no absolute requirement that civilian defendants before a military commission be ordered into either arrest or confinement, in order to assure presence at trial, it might well be wise to "arrest" persons to be tried before the commission and subject them to the "moral restraint" of an order not to leave the country and to appear at the time set for trial. More onerous restraints probably would be unnecessary, especially since no similar precautions were taken when military personnel were charged for offenses committed at Son My.

IV. Pretrial Investigation

The available records disclose no military commission case in which a formal pretrial investigation, such as that required for general courts-martial by Article 32 of the Uniform Code of Military Justice, was conducted. Usually charges have been referred directly to the military commission by the convening authority. In fact, President Roosevelt's order of January 11, 1945, which authorized the trial by military commission of German saboteurs, specifically stated that pretrial investigations were not to be required. Since Article 32 is limited in effect to general courts-martial, there is clearly no statutory requirement involved.

Nevertheless, prudence would seem to require that some sort of pretrial investigation be ordered. First, omitting this procedural step would give rise to the argument that the defendants were being deprived of an important protection by ordering trial by military commission rather than trial by general court-martial. Second, a formal pretrial investigation can be an important device for insulating the convening authority from the process of analyzing and refining the charges. Giving this task to an investigating officer will make the process more objective and less subject to the charge that the trials are politically motivated.

Accordingly, it would probably be best to appoint a disinterested investigating officer and to proceed with a pretrial investigation just as would be required by Article 32. After the pretrial investigation, the convening authority should refer the charges to the appropriate legal officer for consideration and advice. Paragraph 35 of the Manual for Courts-Martial states that if the Secretary is the convening authority, advice should be sought from The Judge Advocate General. After receiving the proper legal advice and the report of the investigating officer, the convening authority

would then refer any appropriate charges to the commission for trial.

V. Trial procedure

A. Trial in general statutory and constitutional limitations; precedents

It is well settled that the mandate of section 2 of Article III of the Constitution that the "Trial of all crimes. . . shall be by Jury" is not applicable in cases which "arise in the land and naval forces" if military jurisdiction is asserted within the constitutional authority to discipline the active military services or to provide for trial of military offenses against the law of nations, *Compare* U.S. Const. Art, 1, sec, 8, cl. 14, *with* U. S. Const. Art. 1, sec. 8, cl 10, and *Ex parte Quirin*, 317 U. S. 1, 40 (1942). But the specific protections of the Bill of Rights, unless made inapplicable to military trials b the Constitution itself, have been held applicable to courts-martial. *Burns v. Wilson*, 346 U.S. 137, 142 (1953); *United States v. Jacoby*, 11 USCMA 428, 29 CMR (1960); *United States v. Tempia*, 16 USCMA 629, 37 CMR 249 (1967); *United States v. Bearchilld*, 17 USCMA 598, 38 CMR 396 (1968). Both logic and precedent indicate that a lesser standard for military commissions would not be constitutionally permissible. In this regard, Winthrop stated:

"Military commissions. . . are commonly conducted according to the rule and forms governing courts-martial... [T]heir proceedings...will not be rendered illegal by the omission of details required upon trials by courts-martial....But, as a general rule, and as the only safe and satisfactory course for the rendering of justice to both parties, a military commission will-like a court-martial--permit and pass upon objections interposed to members. . . will formally arraign the prisoner, allow the attendance of counsel,

entertain special pleas. . . receive all material evidence...hear argument, find and sentence after adequate deliberation, render to the convening authority a fully authenticated record of its proceedings, and...be governed. . . by established rules of and principles of law and evidence."

Winthrop, *Military Law and Precedents*. 1920, at 843. For a similar analysis see Weiner, *A Practical Manuel of Military Law*, 1940, at 122. Congress has not established any procedures which are specifically made applicable to military commissions, but Article 21 Uniform Code of Military Justice (10 U.S.C. 821), which grants military commissions concurrent jurisdiction with courts-martial, can be considered as a congressional approval of the long established practice of tailoring commissions to fit the procedures used in courts-martial. This position is buttressed by the fact that Congress directed the President to establish procedures for courts-martial or other military tribunals which follow, to the extent practicable, the principles of law and the rules of evidence generally followed in United States district courts. Article 36 UCMJ, 10 U.S.C. § 836. It did not indicate that separate procedures for military commissions were either needed or desired.

In Re Yamashita, 327 U.S. 1 (1946), could however, be cited for the proposition that the due process clause of the Fifth Amendment is not applicable to military commissions. In that case, the-majority stated that "Congress by sanctioning trials of enemy aliens by military commission for offenses against the law of war had recognized the right of the accused to make a defence" 327 U.S. at 9. The court refused to consider what else the Fifth Amendment might require, and it held that a number of statutory safeguards set forth in the Articles of War were not applicable even though they would have been controlling in a trial by court-martial. But Justice Murphy in a strong dissent, stated that "the failure of the military commission to obey the dictates of the due process requirements of the Fifth Amendment is apparent

in this case." 327 U.S. at 27. His view would seem to present the better reasoned approach, particularly in view of the expanded scope which the Supreme Court has given over the past decade to those fundamental rights which the due process clause guarantees to all criminal defendants.

Furthermore, due process has been judicially defined as encompassing those fundamental principles of liberty, justice, and fairness which lie at the base of all of our civil and political institutions, and this concept demands that criminal liability be adjudicated by trial rather than inquisition. *See, e.g., Palko v. Connecticut*, 302 U.S. 319 (1937). Although the minimal requirements for the procedures which the trial must follow will depend on what the courts have determined to be essential elements of fundamental fairness, the procedures adopted should provide every safeguard which an accused would be entitled to in a court-martial or a Federal district court. This position would enhance the likelihood of overcoming a defendant's objections that the commission lacked jurisdiction, and it would further the Government's obligation to prosecute persons who offend the law of war without detracting from its equally important responsibility of conducting criminal trials consonant with the protections of the Bill of Rights.

B. Counsel; who prosecutes, defends

It is now settled that the Sixth Amendment's guarantee of counsel is one of the provisions of the Bill of Rights which is fundamental and essential to a fair trial. *Gideon v. Wainwright*, 372 U.S. 335 (1.963). Of course, due process also dictates that a defendant be allowed the assistance of his own attorney. *Chandler v. Fretag*, 3418 U.S. 3 (1954); *Ferguson v. Georgia*, 365 U.S. 570 (1961); *Powell v. Alabama*, 287 U.S. 45 (1932). Accordingly, all defendants in Federal district court are entitled to be represented by counsel of their choice if such counsel are admitted to practice before that particular court (there is no uniform rule governing the

procedure by which practitioners may be admitted for a single case, but it is generally accomplished by a pro-forma motion), and all indigent defendants are entitled to free counsel appointed by the court. Rule 44, Federal Rules of Criminal Procedure. Defendants before a general court-martial fare even better as they are entitled to be represented by any counsel of their choice who is a member of the bar of a Federal court or the highest court of a State, and they are also entitled to a free appointed counsel whether or not they are indigent. Article 27(b), Uniform Code of Military Justice (10 U.S.C. 827).

The Constitution would thus, require that counsel be provided for any indigent tried by a military commission, and that all defendants be allowed to select counsel at their own expense from the ranks of any State or Federal bar. Although not required, it would probably be wise to provide free appointed counsel for all defendants whether or not they were indigent as a failure to do so would discriminate between those tried by court-martial and others tried by commission. It night also open the door to charges that we treat war prisoners more favorably than our own people, as the 1949 Geneva Prisoners' Convention provided that all prisoners of war tried by the host country arc entitled to free counsel. Furthermore, providing free counsel for all defendants, indigent or otherwise, seems to have been the practice which was followed in the past. *See* Weiner, *supra*, at 842. *But see Vallandigham Trial and Habeas Corpus*, 1863, for report of a civil war case where defendant represented himself in a case which was prosecuted by a JAG officer, *See the Trial of Henry Wirz*, 1867, for a trial by military commission where the accused was defended by counsel of his choice,

Thus, President Roosevelt appointed two judge advocate officers to defend Quirin (one of the German saboteurs tried by military commission in 1942) and he appointed the Attorney General and The Judge Advocate General to handle

the prosecution. *In the Yamashita* case, supra, the prosecution was not quite as formidable (General McArthur directed the convening authority to proceed with the trial and it is assumed that a JAG officer handled the prosecution) but General Yamashita was defended by no less than six JAG officers whose defense effort was praised by the Supreme Court. *In Re Yamashita*, 327 U.S. at 5.

There does not seem to be any limitations on who may be appointed for the defense or prosecution other than the obvious limitations that the men selected should be qualified trial attorneys and should not have any conflicting interests. Of course, the nature of the proceedings and precedent would indicate that at least some of the men appointed for both the prosecution and the defense should be members of the military.

C. Power to subpoena witnesses

Article 46, Uniform Code of Military Justice (10 U.S.C. 846) provides in substance that the power of courts-martial to compel the attendance of witnesses and the production of other evidence shall be similar to that of Federal district courts, and shall run to any part of the United States, territories, commonwealths, and possessions. Although Article 46 addresses itself only to the power of the courts-martial to issue subpoenas, Article 47 (10 U.S.C. 847) provides a criminal sanction for any person who fails to appear, after being subpoenaed to appear, as a witness before a "court-martial, military commission, court of inquiry, or any other military court or board . . ." (emphasis supplied). It thus appears that military commissions may compel the attendance of witnesses and the production of other evidence, But the legislative history of the Code is silent as to why Congress chose to define the limits to which court-martial process may run without also defining the limits of process issued by other military tribunals. The geographic limits of process issued by a military commission

are, accordingly, a matter open to speculation. Of course, Article forty-seven's parity treatment of military commissions and courts-martial lends great weight to the proposition that the process of military commissions is at least equal to and concurrent with that of courts-martial. It can also be argued that process in the instant case would run world wide as an inherent attribute of the fact that the crime to be tried is an offense against the law of nations--an offense without territorial limitation--and the fact that the convening authority's "field of command" extends world wide. If Congress has provided the convening authority with the responsibility for prosecuting these offenses, it must have also intended to provide him with the means of accomplishing the task.

D. Granting of immunity

Although a convening authority may not have an inherent power to grant immunity from prosecution for offenses committed against the United States, United States v. Ford, 99 U.S. 593 {1879), the power to grant immunity may be authorized by statute. Brown v. Walker, 161 U.S. 591 (1896). The Uniform Code of Military Justice has been construed as empowering general court-martial convening authorities to grant immunity from prosecution with respect to an offense cognizable in military law. *United States v Kirsch*, 15 USCMA 84, 35 CMR 56 (1964). The court in *Kirsch* reasoned that Congress had provided: that it was to be within the discretion of proper authorities as to whether charges would be referred to a military tribunal; that the President could provide rules of evidence and procedure for military tribunals; and that the decision to refer or not to refer charges to trial was a matter which could be regulated by procedures established by the President. It, therefore, interpreted the provisions of the Manual for courts-martial which established a convincing authority's right to remove a case from trial as a lawfully established means of granting immunity. The case

also held that a convening authority's grant of immunity was coextensive with the accused's Fifth Amendment right against self-incrimination and that it would bar a prosecution in a civilian court. 15 USCMA at 97, 35 CMR at 69, citing *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964). The current Manual provision is based on this case anted it provides in pertinent part that "an authority competent to order a person's trial by general court-martial may grant or promise him immunity from trial," Although it could be argued that the foregoing provision is by its terms applicable only to trial by court-martial, it should be noted that the offenses in the instant case could also have been tried by court-martial and that the Secretary of the Army (or other convening authority) is competent to convene a general court-martial. Furthermore, the President could delegate the power to grant immunity to the convening authority in the Executive Order establishing the military commission and that action could be sustained, using the rationale of Kirsch, as an exercise of the power delegated to him by Congress to establish rules of evidence and procedure for military commissions. It might also be sustained as a proper invocation of the President's constitutional power to grant pardons.

E. Rules of evidence

Congress has provided that the President shall prescribe rules of evidence for trial of cases by court-martial or military commission and that these rules should, as far as practicable, conform with the rules of evidence generally recognized in the trial of criminal cases in Federal district courts. Article 36, UCMJ (10 U.S.C. 836), The President has established detailed rules of evidence for courts-martial and he has provided that military commissions will be guided by these rules. Paragraphs 2, 137, MCM, 1969 (Rev.). Although President Roosevelt directed that the military commissions which tried General Yamashita and Mr. Quirin could admit

such evidence as was probative in the mind of a reasonable man, it would be difficult to argue that hearsay or other arguable probative but objectionable evidence would be permissible by "practicality." Furthermore, the right to confront witnesses is clearly fundamental to a fair trial, and it is thus fairly clear that the hearsay rule (which exists primarily to safeguard the right of confrontation) is a right guaranteed by due process and thus required in a trial by military commission irrespective of whether it is regarded as a practical rule by the President. In any event, the most expeditious and fair solution available would be to have the President exercise his congressional grant of authority (Art 36, UCMJ) by stating in the Executive Order establishing the commission that the rules of evidence are set out in the Manual shall govern. A further caveat could be added that the Manual would not apply if a rule more favorable to the accused were being followed in criminal prosecutions in Federal district courts, but this might cause needless confusion as the rules of evidence which are followed in Federal district court may not be uniform as they depend on the law of the circuit in which the Federal district court is located.

F. Limitations on sentencing power

Congress has provided that the punishment which is a general court-martial may adjudge for an offence punishable by the Code must be consonant with limits set by the Code or by the President for that offense. Articles 18, 56, Uniform Code of Military Justice (10 U.S.C, 818, 856). Congress and the President have provided that the minimum punishment for premeditated or felony-murder is life imprisonment. Paragraph 127c, MCM, 1969 (Rev.); Article 118, Uniform Code of Military Justice (10 U.S.C. 918). But Congress also has stated that a general court-martial has jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and the court may adjudge any punishment

permitted by the law of war. Article 18, Uniform Code of Military Justice 10 U.S.C. § 818). There is no reference to a Presidential limitation on the sentencing power for offenses against the law of war. Since a military commission's jurisdiction is coextensive with that of a general court-martial (Article 21), and Congress has not established a fixed punishment for atrocities which are punishable by the law of war, it may he concluded that a military commission could impose any punishment authorized by the law of war notwithstanding Presidential limitations concerning similar offenses under the Code. Of course, it may be argued that the convening authority has a right to limit the punishment which may be adjudged as in inherent aspect of his power to create the commission. Another basis for such power is that the convening authority of a general court-martial need only approve any part or amount of the sentence which is adjudged. Article 64, UCMJ (10 U.S.C. 864).

Furthermore, the Articles of War in effect when Mr. Quirin and General Yamashita were tried could also be interpreted (although not as readily) as meaning that a military commission could impose any punishment authorized by the law of war without restriction, but an order which established the commission which tried General Yamashita provided that the convening authority could alter the sentence and that a death sentence had to be approved by General McArthur, the convening authority's superior. The order, otherwise allowed the commission to impose any sentence authorized by the law of war. The Executive Order which convened the commission which tried Mr. Quirin and the other German saboteurs provided only that a concurrence of two-thirds of the commission was needed for a conviction and that the record of trial would be directed to the President for his action thereon. A military order signed by President Roosevelt on 11 January 1945 providing for the establishment of military commissions to try saboteurs also provided that a two-thirds vote would be required, but it too

failed to set out limits of punishment. 1945 Supp CPR 170. In this regard, Congress has provided that in trials by court-martial a unanimous vote is required for a death sentence, a three-fourths vote for a sentence to confinement for more than 10 years, and a two-thirds vote for all other sentences. Article 52, Uniform Code of Military Justice (10 U.S.C. 852). Article of War 43, in effect during the *Yamashita* and *Quirin* trials, also required a unanimous vote for a death sentence, but it specifically mentioned sentences by court-martial and it did not refer to sentences by other types of military tribunals. Article 52 of the Uniform Code also refers to questions to be decided by courts-martial, and it might thus be contended that the limitations of Article 52 do not apply to trial by military commissions. This would leave the convening authority free to establish any voting requirement. Of course, sentencing in Federal district court is done by the judge and this alternative might be made part of the oder convening the commission if Article 52 is determined to be inapplicable.

It may be concluded that e military commission may impose any punishment which is authorized by the law of war. It would seem clear that a death sentence or life imprisonment could be imposed for persons convicted of mass murders as these punishments are in accord with customary law of war for serious cases of unlawful belligerency. *Ex parte Quirin*, *supra*, *Wirz*, *supra*. The President or convening authority probably has the power to set a maximum sentence which the commission may impose, and the convening authority can probably set any voting requirement, but these points are not free from doubt. Accordingly, the most prudent approach would be to have the Executive Order establishing the commission provide that the commission may impose any sentence which is authorized by the law of war and that the vote required should conform with the Article 52 requirements for courts-martial. The danger of an excessive punishment could be alleviated

through review procedures and provision that the commission be guided by the maximum punishments for analogous offenses under the Uniform Code.

VI. Review

A. Use of the Regular Military Review System

The review procedures set forth in the Uniform Code, like their antecedents in the Articles of War, are by their terms applicable only to court-martial cases. The review procedures of the Articles of War were, nonetheless, held to be usable with respect to cases tried by military commission. *See* Weiner at 112; Winthrop at 846; Dig. Op. J.A.G., 1912, p. 1070. Accordingly, President Roosevelt in an Executive Order of 11 January 1945 provided that record of trial by military commission would be reviewed in accordance with Article of War 50½, the predecessor of Article 66 of the Uniform Code. Although Article of War 50½ provided for review of certain cases by a board of review, the functions of those boards were somewhat different from practice under the Code, and these differences may be pertinent in considering whether precedent under the Articles of War is still valid.

One prisoner convicted by a military commission convened pursuant to the 11 January 1945 order collaterally attacked his conviction, alleging that the commission had lacked jurisdiction to proceed against him. Denial of the petition was affirmed by the Court of Appeals, but the court did not discuss the efficacy of the review procedures used after conviction. *Colepaugh v. Looney*, 235 F. 2d 429 (10 Cir. 1956).

The review procedures required for court-martial cases tried under the Articles of War were not, however, adopted in either the *Quirin* or the *Yamashita* case. In *Quirin* the

Executive Order that convened the commission provided only that the record would be transmitted diretly to the President for his action. Except for an unsuccessful collateral attack, *Ex parte Quirin* 317 U.S. 1 (1942), review by the convening authority was the extent of appellate review afforded these accused. The record of General Yamashita's trial was directly reviewed by the convening authority, but a provision in the order authorizing trial provided for additional review by the convening authority's superior in the event that a sentence of death was adjudged. The concept of limiting review to the convening authority is further discussed in part C., post.

It has been held that both the Court of Military Appeals and the U.S. Army Court of Military Appeals and the U. S. Army Court of Military Review are "courts" of the United States competent to issue all writs and orders necessary in aid of their jurisdiction. *United States v. Frischholz*, 16 USCMA 150, 36 CMR 306 (1966); *United States v. Draughhon*, ____ CMR ___ (ABR 1970) The judicial power granted these tribunals by Congress is limited, however, to the review of court-martial cases under the terms of Articles 66 and 67 if the Uniform Code,10 U.S.C. §§ 866 and 867, and therefore actions by military authority not involving "proceedings before a court- martial" are beyond the scope of review of the Court of Military Appeals and, perforce, the U.S. Army Court of Military Review *Mueller v. Brown*, 18 USCMA 534, 40 CMR 246 (1969).

In view of the limitations of the jurisdiction of the regular military appellate tribunals, it would not appear possible to provide that the findings and sentence of a conviction by military commission will be reviewed pursuant to Articles 66 and 67 of the Code; neither court could act in its limits imposed upon it by Congress.

The review provided by Article of War 50 ½, which was used in some cases of trial by military commission, differed

from that now provided in. Articles 66 and 67 of the Uniform Code in several respects. Although both the Articles of War and Article 66 of the Code (prior to enactment of the Military Justice Act of 19G8) authorized creation of boards of review to be manned by persons selected by The Judge Advocate General, practice under the Articles of War did not contemplate that boards of review would provide more than recommendations. Boards of review under the Articles of War did not purport to dispose of cases by their own action; action by The Judge Advocate General or the President was necessary to implement the conclusions of the boards. There was no statutory provision in the Articles of War assuring the independence of board members in their judicial capacity. In short, those boards of review had few, if any, of the powers and trappings that distinguish a court. Such status contrasts with the status of the current appellate agencies, especially since the Military Justice Act and its denomination of boards of review as Courts of Military Review. It is unlikely that a Court of Military Review would acquiesce to an argument that it could be assigned duties beyond those of the statute that created it.

It should be noted; however that it is the court, and not its members, which has its functions limited by statute. It is not unprecedented for judicial officers to be asked to serve in some other official capacity on a pro hac basis. For example, Mr. Justice Jackson was detailed to prosecute some of the German war criminals at the Nuremberg Trials after World War. II, and Chief Justice Warren assented co lead a commission which inquired into the assassination of President Kennedy. Inasmuch as members of the L.S. Army Court of Military Review are military officers subject to assignment by The Judge Advocate General, there would not appear to be any problems in having the record of trial by military commission reviewed by members of the Court of Military Review, acting in their individual capacities and not

as the court established by Congress in Article 66 of the Uniform Code.

B. Special Review System.

Having concluded chat the jurisdiction of the U.S. Army Court of Military Review and the Court of Military Appeals is limited to court-martial cases, it appears that some other provision must be made for review of convictions by military commission. One method would be to create a system of review chat approximates as closely as possible that used for court-martial cases.

The only statutory material describing review of military commissions is 10 U.S.C. § 3037(c)(3), which, requires The Judge Advocate General to "receive, revise and have recorded the proceedings of .., military commissions." The Judge Advocate General's functions have, in this context, been considered chiefly ministerial and advisory, with the term "revise" imposing only a duty to assure that the record is in proper form and not providing the authority to reverse a decision. *See Ex parte Mason*, 256 Fed. 384 (C.C.A. N.Y. 1882).

Once The Judge Advocate General has, in accordance with his statutory duty, received and perused the record, it could be transmitted to members of the U.S. Army Court of Military Review (or a panel of that court) to be reviewed as would have been a court-martial case. If this procedure is adopted, it should be specified that the powers of the reviewing panel be similar with respect to action on findings and sentence to those exercised by the Court of Military Review in court-martial cases, lest resort to the military commission appear to have resulted in fewer safeguards for the accused than would have been present had the case been referred to trial by court-martial

There does not appear to be any way that the record of trial by military commission could be reviewed by the Court

of Military Appeals or its judges. Unlike the appellate military judges which constitute the U.S. Army Court of Military Review, the judges of the Court of Military Appeals have no military status and are not assigned by The Judge Advocate General.

It should be noted that, in view of the seniority of the convening authority proposed (I A, above), review by a panel of appellate military judges should precede action by the convening authority. Such a sequence would permit the convening authority to take final action on the record after review by the appellate military judges without having prejudged the merits of any issues presented by the record.

C. Review by Convening Authority Alone

Although founded on precedent, limitation of review to the convening authority would present several disadvantages and might well suffice alone to make any convictions amenable to collateral attack. *See Burns v, Wilson*, 346 U.S. 137 (1953). Proper review by the convening authority alone, even with the advice and recommendations of The Judge Advocate General would require personal scrutiny of the entirety of what might be a voluminous record. Limitation of review to the individual who initially exercised prosecutorial discretion by referring the charges to trial would be an extreme departure from 'the safeguards enjoyed by accused before general courts-martial, and, indeed, would provide fewer protections than those granted accused before special and summary courts-martial, which must always be reviewed by an authority superior to the convening authority. For these reasons review by the convening authority alone does not lend itself to adoption, let alone serious consideration, let alone serious consideration.

VII. Execution of Sentences

Conceptually, if the military commission has Jurisdiction to proceed against an accused, it must also have the power to invoke that jurisdiction to its logical conclusion. Article 58 of the Uniform Code specifically alludes to courts-martial and "other military tribunal(s) when it provides that sentences to confinement may be executed in any penal institution under the control of the United State;. Article 58, Uniform Code of Military Justice, 10 U.S.C. § 858. Other provisions concerning sentences are, however, limited by their terms to court-martial cases and do not embrace the "other military tribunals" which might adjudge sentences. See Articles 58a, 71, 76, Uniform Code of Military Justice, 10 U.S.C. 88 856a, 871, 876.

The touchstone of the sentencing power is the question of jurisdiction, however, and if jurisdiction is found the execution of any sentence permitted by the law of war is authorized by virtue of the judgment of the commission itself. If it is lawful, that judgment provides the executive with the authority to execute the sentence adjudged notwithstanding the paucity of specific legislative enactments concerning the methods by which such sentences are to be executed.